STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court Of Appeals
(Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative, Estate of ENA BEGOVIC, Deceased; JOSIP RADELJAK, Individually and as Next Friend of LANA RADELJAK; LEO RADELJAK and TEREZA BEGOVIC,

Plaintiffs-Appellees,

-v-

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

/

Supreme Court No. 127679

Court of Appeals No. 247781

Lower Court
Case No: 02-228401-NP

BRIEF ON APPEAL—APPELLANT DAIMLERCHRYSLER CORPORATION

BUSH SEYFERTH KETHLEDGE & PAIGE PLLC
Raymond M. Kethledge (P49235)
3001 W. Big Beaver Road, Suite 600
Troy, MI 48084
(248) 822-7800

Attorneys for DaimlerChrysler Corporation

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JURISDICTIONAL STATEMENT

On March 14, 2003, the Circuit Court entered an Order dismissing Plaintiffs' claims on *forum non conveniens* grounds. Plaintiffs timely appealed. On December 14, 2004, the Court of Appeals (Cavanagh, P.J., and Jansen and Fort Hood, JJ.) reversed the Circuit Court's Order and remanded the case for further proceedings. On June 10, 2005, this Court granted DaimlerChrysler Corporation's application for leave to appeal. This Court has jurisdiction over this appeal under MCR 7.301(A)(2).

QUESTION PRESENTED

Whether the Circuit Court abused its discretion in dismissing this case on *forum non conveniens* grounds, when the case is brought by Croatian citizens, requires application of Croatian law, arises out of an accident occurring in Croatia, and involves a vehicle sold in Italy.

STATEMENT OF FACTS

I. Plaintiffs' Allegations

The Plaintiffs in this case, Josip Radeljak (individually and as personal representative of the Estate of Ena Begovic and as next friend of Lana Radeljak), Leo Radeljak, and Tereza Begovic, are all residents of Croatia. Radeljak Complaint ¶2 (App. 18a). The action arises out of an accident that occurred on August 15, 2000, on the Island of Brac, in Croatia. *Id* ¶5 (App. 19a).

Plaintiffs allege that Plaintiff Leo Radeljak was driving a 1993 Jeep Grand Cherokee, VIN 1J4GZB8S8PC572359 (the "Jeep"), at the time of the accident. *Id* ¶¶7, 12 (App. 19a-20a). Ena Begovic and Plaintiffs Josip Radeljak and Tereza Begovic were passengers in the vehicle. *Id* ¶7 (App. 19a). According to the Complaint, the Jeep's transmission shifted unexpectedly from Park to Reverse, "causing the vehicle to travel rearward" off the road and down a ravine. *Id* ¶¶12, 13 (App. 20a). Ena Begovic was fatally injured during the accident. *Id* ¶6 (App. 19a).

II. Proceedings Below

Plaintiffs filed their Complaint in Wayne County Circuit Court in August 2002. DaimlerChrysler Corporation ("DCC") timely filed both its Answer and a Motion to Dismiss on *Forum Non Conveniens* Grounds on October 3, 2002. After holding oral argument on the Motion, the Circuit Court entered an Opinion and Order Granting Defendant's Motion for Dismissal (the "Circuit Court Order") on March 14, 2003, holding that Croatia—as the place where the accident occurred and the Plaintiffs reside—"is a more appropriate forum" for this case. Circuit Court Order at 3 (App. 7a).

Plaintiffs appealed. In an Opinion dated December 14, 2004 (the "Court of Appeals Opinion"), the Court of Appeals (Cavanagh, P.J., and Jansen and Fort Hood, JJ.) held that the

Circuit Court had abused its discretion in ruling that Croatia was a more appropriate forum than Wayne County for this case. Court of Appeals Opinion at 7 (App. 17a). Accordingly, the Court of Appeals remanded the case to the Circuit Court for further proceedings.

SUMMARY OF ARGUMENT

Michigan is not Courthouse to the World. Michigan has little or no interest in adjudicating lawsuits brought by foreign plaintiffs based upon automobile accidents occurring in foreign countries. Instead, *those* countries have the predominant interest in adjudicating suits brought by their citizens based on accidents occurring on their soil. But if the Court of Appeals' Opinion is allowed to stand—if Michigan Courts are indeed without discretion to refuse jurisdiction over a case brought by Croatian plaintiffs based upon an accident occurring in Croatia—then *every* vehicular accident, occurring anywhere in the world, can give rise to a lawsuit here in Michigan, so long as the vehicle manufacturer's headquarters are located here. Indeed, the same is true for any accident involving *any* product whose manufacturer has facilities in Michigan. The law—and common sense—should bar that result.

ARGUMENT

I. Standard of Review

A trial court's decision granting or denying a motion to dismiss on *forum non conveniens* grounds is reviewed for an abuse of discretion. *Miller v Allied Signal, Inc.,* 235 Mich App 710, 713; 599 NW2d 110 (1999).

II. The Circuit Court Properly Dismissed This Case On *Forum Non Conveniens* Grounds

A. The *Cray* Factors

The doctrine of *forum non conveniens* allows a court "to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked." *Hacienda Mexican*

Restaurants v Hacienda Franchise Group, Inc., 195 Mich App 35, 38; 489 NW2d 108 (1992) (internal quotation marks omitted). The doctrine "presupposes that there are at least two possible choices of forum." *Id.* Once the existence of an alternative forum is established, the Court should consider the following factors in determining whether to refuse jurisdiction on *forum non conveniens* grounds:

1. The private interest of the litigant.

    a. Availability of compulsory process for attendance of unwilling and the cost of obtaining willing witnesses;
    b. Ease of access to sources of proof;
    c. Distance from the situs of the accident or incident which gave rise to the litigation;
    d. Enforceability of any judgment obtained;
    e. Possible harassment of either party;
    f. Other practical problems which contribute to the ease, expense and expedition of the trial;
    g. Possibility of viewing the premises.

2. Matters of public interest.

    a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
    b. Consideration of the state law which must govern the case;
    c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens.*

Cray v General Motors Corp, 389 Mich 382, 396; 207 NW2d 393 (1973).

These factors are almost identical to those considered by federal courts.[1] The Michigan test was modeled on the test set forth by the United States Supreme Court in *Gulf Oil Corp. v*

[1] In *Gulf Oil Corp. v Gilbert,* 330 US 501 (1947), the United States Supreme Court described the relevant factors as follows:

> An interest to be considered . . . is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view

Gilbert, 330 US 501 (1947). *See Cray,* 389 Mich at 396 (citing *Gilbert*). Federal cases therefore provide important guidance to the issue presented here.

Plaintiffs have never disputed that Croatia is an alternative forum for this case. *See* Plaintiffs' Brief On Appeal (cited pages attached as Exhibit C) at 11. The issue presented on appeal, therefore, is whether the Circuit Court abused its discretion in holding that Plaintiffs' home country is a more appropriate forum for their case than is Wayne County, Michigan. As shown below, it is clear that the Circuit Court did not abuse its discretion.

B. The *Cray* Factors Require Dismissal Here

1. The "Private Interest Of The Litigant"

The parties would face extraordinary difficulties if Plaintiffs' claims remained in Wayne County Circuit Court.

a. The "Availability of Compulsory Process for Attendance of Unwilling and the Cost of Obtaining Willing Witnesses"

This factor standing alone warrants dismissal of this case on *forum non conveniens* grounds. It is undisputed that Michigan courts lack powers of compulsory process over witnesses in Croatia. *See* MCR 2.506(G)(1). As a different panel of the Court of Appeals explained in a case arising in Canada:

> would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. . . .
>
> Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself. [*Id* at 508-09.]

> [T]he *res gestae* witnesses . . . are presumably Canadian residents and, thus, may be beyond the subpoena power of Michigan Courts. *See* MCR 2.506(G)(1). This would undoubtedly increase the costs of litigation. Considering such costs and the likelihood that the attendance of some witnesses could not be procured, the defendant may be forced to conduct a trial by deposition, if even that is possible.

Holme v Jason's Lounge, 168 Mich App 132, 135; 423 NW 2d 585 (1988); *see also Michell v General Motors Corp*, 439 F Supp 24, 27 (ED Ohio 1977) ("If the trial of this case were held in the United States, defendant would not be able to compel such persons to appear as witnesses at trial and has no guarantee that they would appear voluntarily").

Because Michigan Courts have no power of compulsory process over persons and things in Croatia, the parties would be forced to use "letters rogatory" to obtain testimony from witnesses there. *See Penwest Development Corp Ltd v Dow Chemical Co*, 667 F Supp 436, 440 (ED Mich 1987). Letters rogatory are obtained "[p]ursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters[.]" *Seguros Comericial Americas S.A. v American President Lines, Ltd.,* 933 FSupp 1301, 1312 (SD Tex 1996); *see also Vasquez v Bridgestone/Firestone,* 192 FSupp 2d 715, 725 (ED Tex 2001) (same), *vacated on other grounds,* 325 F3d 665 (CA 5 2003).

Numerous courts have noted the difficulties attending the letters rogatory process—sometimes in blistering terms. *See, e.g., Ilusorio v Ilusorio-Bildner,* 103 FSupp2d 672, 677 (SD NY 2000) ("The Court further finds that the use of letters rogatory to obtain foreign witnesses' testimony would be a time consuming and prohibitively expensive means of obtaining discovery"); *DeYoung v Beddome,* 707 FSupp. 132, 139 (SD NY 1989) ("where discovery of third parties in Canada . . . would have to be conducted by cumbersome letters rogatory, it would be downright perverse to argue that there is anything close to equal convenience in trying this case here or in Canada, modern communications notwithstanding") (emphasis added); *In Re*

Arakis Energy Corporation Securities Litigation, 2001 WL 1590512 at *11 (ED NY 2001) (use of "letters rogatory necessary in order to conduct discovery of witnesses and obtain documents . . . in Canada and the litigation relating to those letters rogatory were time consuming and difficult"); *Jennings v Boeing Co.,* 660 FSupp 796, 806 (ED Pa 1987) (letters rogatory "are cumbersome and costly, and often fail to adequately secure full foreign discovery"), *aff'd,* 838 F2d 1206 (CA 3 1988); *Syndicate 420 at Lloyd's of London v Glacier General Assurance Co.,* 604 FSupp 1443, 1448 (ED La 1985) (use of letters rogatory is a "cumbersome, expensive, and time-consuming process that should be avoided when possible"). These difficulties will be avoided if Plaintiffs simply litigate this case in their home country.

Moreover, even if letters rogatory were honored by Croatian authorities, the parties would then be able to obtain only deposition testimony pursuant to them, not trial testimony. *Seguros,* 933 F Supp at 1312. Of course, "relying on depositions instead of live testimony would deprive the court and the trier of fact from evaluating the credibility of witnesses." *Vasquez,* 192 F Supp 2d at 725. Thus, even if procedurally "successful," the need for letters rogatory would result in an inferior trial.

Finally, even if certain of the witnesses in Croatia would be willing voluntarily to give testimony in the United States, "the cost of transporting and domiciling such a group would be expensive[.]" *Id* at 725. And whether, when the time comes, such witnesses would be willing actually to testify here, remains an open question. There is a reason why courts issue subpoenas rather than invitations.

The United States Supreme Court has observed: "To fix the place of trial at a point where litigants cannot compel personal attendance [of witnesses] and may be forced to try their cases

on depositions, is to create a condition not satisfactory to the court, jury, or most litigants." *Gilbert*, 330 U.S. at 511. Such is the case here.

b. "Ease of Access to Sources of Proof"

This factor also supports dismissal. All the case-specific evidence in this case is located in Croatia. Such evidence includes any police, ambulance and hospital records, forensic reports, and additional evidence relating to damages. Just as this Court has no power to compel the appearance of persons residing in Croatia, however, so too it cannot compel the production of documents or things located there.

Consequently, if this case is not dismissed, the parties will have great difficulty obtaining critical documentary and physical evidence relating to Plaintiffs' claims. This difficulty will mirror that described in connection with witness testimony, including the need for letters rogatory under the Hague Convention.

c. "Distance From the Situs of the Accident or Incident Which Gave Rise to the Litigation"

This factor supports dismissal. The accident giving rise to this lawsuit occurred "on the Island of Brac, Croatia." Complaint ¶5 (App. 19a). The "situs of the accident," therefore, is extremely remote from the Wayne County Circuit Court.

This remoteness would impede litigation of the case. Although Plaintiffs overlook the point, causation remains an element of their case. That issue—in a case where the Jeep is alleged to have slipped out of gear, backed off a roadway, and fallen down a ravine—will require extensive access to and examination of the accident scene, among other things. For reasons both logistical and jurisdictional, access to—and perhaps even control of—a scene on the Island of Brac would be more readily obtained if Croatian courts rather than Michigan ones exercise jurisdiction over this case.

d. "Enforceability of Any Judgment Obtained"

This factor supports dismissal. Plaintiffs concede that a judgment in this case "would be enforceable, whether rendered by a Michigan or Croatian court." Plaintiffs' Brief On Appeal at 11.

e. "Possible Harassment of Either Party"

Plaintiffs' claims were presumably filed here for purposes of forum shopping, not harassment. Nevertheless, the difficulties relating to extracting evidence from Croatia would present ample opportunity for harassment. This factor therefore supports dismissal.

f. "Other Practical Problems Which Contribute to the Ease, Expense and Expedition of the Trial"

As the United States Supreme Court has observed, joinder of potentially responsible third parties "is crucial to the presentation of [a defendant's] defense." *Piper Aircraft v Reyno,* 454 US 235, 259 (1982). For if the defendant "can show that the accident was caused not by a design defect, but rather by the negligence" of a third party in the plaintiff's home country, the defendant "will be relieved of all liability." *Id.*

Such joinder cannot occur in Michigan. If this case were litigated in Michigan, DCC would be unable to implead Croatian persons or entities that may be responsible for causing the accident or enhancing Plaintiffs' damages. These could include, for example, any persons or dealerships servicing the Jeep, and the attending medical personnel. Each of these persons or entities may bear responsibility for Plaintiffs' injuries, but none of them can be impleaded into an action in Michigan. Indeed, given the evidentiary difficulties discussed above, Defendants may have difficulty even identifying responsible third parties in Croatia, much less impleading them.

In contrast, if the case were litigated in Croatia, the trial court could likely assert jurisdiction over all the potentially responsible parties. Consequently, "the problems posed by

the inability to implead potential third-party defendants clearly support[s]" dismissal on *forum non conveniens* grounds." *Id.*

g. "Possibility of Viewing the Premises"

This factor likewise supports dismissal. If there is any "controversy concerning the circumstances of the accident, it is also possible that a Court or jury, as finder of the facts, might benefit from a view of the scene of the accident." *Michell*, 439 FSupp at 27, n. 3. This cannot happen if the case is litigated in Michigan.

2. Matters of Public Interest

Litigation of this case in Michigan rather than Croatia would require an immense time commitment from the Michigan Courts. And it would do so to the detriment of other cases in which Michigan citizens have a much greater interest.

a. "Administrative Difficulties Which May Arise in an Area Which May Not Be Present in the Area of Origin"

This case would present the trial court with a number of serious administrative difficulties. If the case remains in Wayne County, the parties would need continually to seek judicial assistance in submitting letters rogatory to the Croatian government pursuant to the Hague Convention. As discussed above, this would be a protracted and unfamiliar process for a Wayne County Circuit Court judge, not to mention the parties. Moreover, when coupled with the delays inherent in the translation process, the need to utilize letters rogatory would likely keep this case on the docket for years to come.

b. "Consideration of the State Law Which Must Govern The Case"

Croatian law will govern Plaintiffs' claims if they remain before the trial court. "In tort cases, Michigan courts use a choice-of-law analysis called 'interest analysis' to determine which state's law governs a suit where more than one state's law may be implicated." *Hall v General*

Motors Corp., 229 Mich App 580, 585; 582 NW2d 866 (1998), *lv den,* 459 Mich 986; 593 NW2d 556 (1999). Under this approach, the Court "must determine if any foreign state has an interest in having its law applied." *Id.* If a foreign state does have such an interest, "we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests." *Id.*

The Court of Appeals has twice held foreign law applicable in cases indistinguishable from this one. In *Farrell v Ford Motor Company,* 199 Mich App 81; 501 NW2d 567 (1993), *lv den,* 445 Mich 863; 519 NW2d 158 (1994), a North Carolina resident brought suit in Michigan based on an automobile accident occurring in North Carolina. Applying the "interests analysis," the Court found that "North Carolina has an obvious and substantial interest" in having its law applied to the case. *Id* at 93. In contrast, "Michigan has no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina." *Id* at 94. Rather, "Michigan is merely the forum state and situs of defendant's headquarters." *Id.* Thus, the Court concluded, "[s]uch minimal interests are insufficient to justify the results-oriented forum shopping that has been attempted." *Id.* Accordingly, the Court held that the law of the situs of the accident—North Carolina—applied to plaintiffs' claims.

Similarly, in *Hall,* the "plaintiff lived in North Carolina, worked for a North Carolina employer, and was injured in North Carolina by a vehicle owned, registered, licensed, and insured in North Carolina, and plaintiff subsequently received treatment at Duke Medical Center in North Carolina." 229 Mich App at 585-86. Thus, the Court held, "North Carolina . . . obviously has a substantial interest in applying its law to this dispute." *Id* at 586. Quoting *Farrell,* the Court of Appeals also noted that "Michigan has little or no interest in this North

Carolina accident involving a North Carolina resident." *Id* at 591. The Court therefore held that North Carolina law governed plaintiffs' claims.

This case is indistinguishable from *Hall* and *Farrell.* Michigan has little or no interest in a Croatian accident involving Croatian citizens. Nor does Michigan have any interest in "affording greater rights of tort recovery to a [Croatian] resident than those afforded by" Croatian law. *Farrell,* 199 Mich App at 94.

In contrast, Croatia has an obvious and substantial interest in applying its law to an accident involving its citizens and occurring on its soil. Croatian law therefore governs Plaintiffs' claims.

The U.S. Supreme Court has "explicitly held that the need to apply foreign law point[s] towards dismissal." *Piper Aircraft*, 454 US at 260. The Circuit Court properly followed that directive here.

c. "People Who Are Concerned by the Proceeding"

This factor lies at the nub of this appeal. Although litigation of this case would be easier in Croatia than in Michigan, the case will impose burdens wherever it lands. Those burdens should be borne by the jurisdiction with the greater interest in the case. In a case brought by Croatian citizens and arising on Croatian soil, that jurisdiction is obviously Croatia.

As the United States Supreme Court has observed, "there is 'a local interest in having localized controversies decided at home.'" *Piper Aircraft,* 454 US at 260 (quoting *Gilbert,* 330 US at 509). "Home" for this case is Croatia. Conversely, the Michigan "interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id* at 261. These facts compel dismissal here.

d. "Reasonable Promptness in Raising the Plea of Forum Non Conveniens"

Defendants filed their *forum non conveniens* motion at the same time they filed their Answer. Thus, there is "no dispute that the final factor, defendants' reasonable promptness in raising the *forum non conveniens* plea, weighs in defendants' favor." *Cooper Tire & Rubber Company v Moore,* 2001 WL 672592, *2 (Mich App 2001), *lv den*, 465 Mich 913; 638 NW2d 748 (2001).

3. Plaintiffs' Choice Of Forum Is Not Entitled To Deference

The United States Supreme Court has held that, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft,* 454 US at 256. Thus, as foreign citizens and residents seeking to litigate claims in American courts, Plaintiffs' choice of forum is entitled to little or no deference here.

C. The Court Of Appeals Misapplied *Cray*

The Court of Appeals' Opinion misapplies virtually every factor of the *Cray* analysis. DCC will focus on three errors in the Court's analysis. First, the Court asserts that parties' ability to access witnesses and evidence "appears equal between the two forums." Court of Appeals Opinion at 3. Respectfully, this assertion does not withstand scrutiny. As shown above, if the case were litigated in Michigan, DCC would have to utilize letters rogatory under the Hague Convention to access witnesses and evidence in Croatia. This fact is not mentioned, much less discussed, in the Court of Appeals' Opinion. The Opinion nowhere mentions the burdens the letters-rogatory process would impose on the parties. The Opinion nowhere mentions the burdens this process would impose on the Wayne County Circuit Court. And it nowhere explains how the *Cray* analysis can proceed without consideration of these issues.

Instead, the Court asserts that "Michigan has witnesses and documentation regarding design of the Jeep[,]" and that Plaintiffs might have difficulty obtaining this evidence if the case were litigated in Croatia. *Id.* Critically, however, Plaintiffs would *not* need to resort to letters rogatory to obtain this evidence if the case were litigated in Croatia. Rather, to the extent such evidence would be unavailable pursuant to discovery in a Croatian case, Plaintiffs' Michigan counsel could simply petition the Michigan Circuit Court for the county in which the evidence is located for a subpoena to compel its production. *See* MCR 2.305(E) (authorizing subpoenas for depositions and document production in connection with an "action pending . . . in another country"). This procedure is typically handled *ex parte,* imposing minimal burdens on the parties and the Court. *See* MCR 2.305(E) ("The court may hear and act upon the petition with or without notice, as the court directs"). Litigation of this case in Croatia, therefore, would eliminate the need for navigating the procedures of the Hague Convention. This fact strongly supports dismissal.

Second, the Court of Appeals asserted that, "[f]or all this Court knows, Croatian dockets may be more glutted than Wayne County's docket." *Id* at 5. From whence came the relevance of the Croatian court docket, the Court of Appeals did not say. This Court's decision in *Cray* did not require the Circuit Court to inventory the docket of Croatian courts before exercising its discretion to refuse jurisdiction in this case. And for good reason: Information concerning the dockets of courts in foreign countries might be no more available to Michigan courts than are witnesses and documents there. If left in place, this requirement would, as a practical matter, preclude application of the *forum non conveniens* doctrine in cases such as this one.

Finally, and perhaps most implausibly, the Court of Appeals held that "Michigan residents arguably have more of an interest [than Croatia does in this case] given that the product

was designed and manufactured in Michigan." *Id* at 6. But the same was true with respect to the products in *Hall* and *Farrell,* and those Courts properly held that Michigan had "little or no interest" in adjudicating those cases. *See Hall,* 229 Mich App at 591; *Farrell,* 199 Mich App at 93. In contrast, Croatia has a "very strong interest" in a lawsuit brought by its citizens based on an accident occurring on its soil. *See Piper,* 454 US at 260 (affirming dismissal on *forum non conveniens* grounds because, among other things, "Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish").

The Court of Appeals simply disregarded this authority. Croatia has the far greater interest in this litigation, and the case should have been filed there, not here.

III. The *Cray* Public-Interest Factors Should Be Revised

This Court's Order granting leave to appeal directs the parties to brief whether the *Cray* public-interest factors should be modified. The Court of Appeals' flawed analysis in this case demonstrates that, clearly, they should be.

The *Cray* factors should be modified precisely as suggested by Justice Markman in his statement concerning denial of leave to appeal in *Present v Volkswagen of America, Inc.,* 462 Mich 908; 612 NW2d 158 (2000). Specifically, in determining whether to dismiss a case on *forum non conveniens* grounds, the court should consider "the extent to which accommodating the instant lawsuit in Michigan will have consequences for the number and types of future lawsuits heard by Michigan courts." *Id* at 908.

This is only common sense. Precedent lies at the heart of our legal system, and so a court must consider the consequences of its decision on future cases. Cases that present a serious *forum non conveniens* issue, by definition, have an alternative forum with a significant connection to or interest in the litigation. Each time a court permits such a case to be litigated in

Michigan, it sets a precedent that encourages future cases to be filed here rather than in the other forum. As an institutional matter, therefore, the court's inquiry should not myopically focus only on the effects of its decision on the case at hand. Instead, the court must consider the consequences of its decision on "the number and types of future lawsuits heard by Michigan courts." *Id.* The Court of Appeals did not even attempt to do that here.

This factor is especially important in cases brought by foreign plaintiffs based on incidents occurring on foreign soil. It is no secret, as the U.S. Supreme Court has observed, that American courts "are extremely attractive to foreign plaintiffs[.]" *Piper,* 454 US at 252. And the pool of prospective plaintiffs worldwide is extremely large. One court's decision to accommodate a case of this kind thus may encourage legions of other cases to follow. The consequences of a court's decision to accommodate a case like this one, therefore, are potentially far greater than those of a decision to accommodate a case arising in another State. A court should consider those consequences.

The stakes are particularly high for Michigan courts. In language that adumbrates the concern raised by Justice Markman—but which appears to have been lost in translation in *Cray*—the *Gilbert* Court cautioned that "[a]dministrative difficulties follow for courts when litigation is piled up in *congested centers* instead of being handled at its origin." 330 US at 508 (emphasis added). Michigan is indisputably a "center" not only of automotive manufacturing, but manufacturing generally. If a manufacturer's presence in Michigan is enough to allow it to be sued here by plaintiffs worldwide, Michigan's courts will be congested indeed with cases like this one.

Even more than other States, therefore, Michigan courts must give careful consideration to the concern articulated by Justice Markman in *Present.* The *Cray* public-interest factors should be revised accordingly.

IV. This Court Should Announce A Categorical Rule Favoring Dismissal Of Cases Like This One On *Forum Non Conveniens* Grounds

This case is not unique. To the contrary, the factors favoring dismissal of this case are common to virtually every case brought by foreign plaintiffs based on incidents occurring on foreign soil. Specifically, in such cases, Michigan courts will always lack powers of compulsory process over persons or things in the country in which the case arose. Use of letters rogatory will thus be necessary in virtually every such case. The situs of the accident will almost always be remote, sometimes extremely so. The foreign plaintiff's choice of forum will be entitled to little if any deference. And the defendant in such cases will be unable to implead potentially responsible parties in the plaintiff's home country, a factor deemed "crucial" by the United States Supreme Court in *Piper Aircraft. See* 454 US at 259.

The court, for its part, will be almost always be faced with the task of "untangl[ing] problems in conflicts of laws, and in law foreign to itself." *Gilbert,* 330 US at 508. The country in which the case arose will have a greater interest in the case than does Michigan. And the staggering implications of accommodating cases like these will always be present.

This Court should therefore announce a categorical rule applicable to these cases. Specifically, the Court should make clear that any case, brought by a foreign plaintiff based on an incident occurring on foreign soil, should be dismissed on *forum non conveniens* grounds if the plaintiff has an alternative forum in his home country, or, if different, the country in which the incident occurred. This rule would ensure that cases with similar facts for purposes of the

Cray analysis are treated similarly. The rule would also ensure that those factors are properly applied, which plainly did not happen here.

Two points bear mention with respect to this proposed test. First, the Court should make clear that the requirement of an alternative forum is easily met: "Ordinarily, this requirement will be satisfied when the defendant is 'amendable to process' in the other jurisdiction." *Piper Aircraft,* 454 US at 255 n.22 (quoting *Gilbert,* 330 US at 506-07).

Second, absent "rare circumstances"—such as where the alternative forum simply "does not permit litigation of the subject matter of the dispute" as a categorical matter, *id*—the Michigan court need not determine whether the alternative forum's law is more or less favorable to the plaintiff in determining whether the case should be litigated there. As the United States Supreme Court has explained:

> If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. . . . The doctrine of *forum non conveniens*, however, is designed in part to help courts *avoid* conducting complex exercises in comparative law.

Piper Aircraft, 454 US at 251 (emphasis added).

A central tenet of the rule of law is that it be uniformly applied. As the Court of Appeals' decision in this case illustrates, however, multi-factor tests like that in *Cray* are particularly susceptible to uneven application. Adopting the categorical rule proposed above will go far to ensure that the rule of law prevails in cases like this one.

V. The Court Of Appeals' Decision In *Robey v Ford Motor Company* Should Be Overruled

In its Order granting leave to appeal, the Court also directs the parties to brief "whether, even if a more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is 'seriously inconvenient.' *See Roby v Ford Motor Co,* 155 Mich App 643, 645 (1986)."

This question involves the relative importance of certain of the *Cray* convenience factors, on the one hand, and the factors concerning the potential forums' respective interests in the case, on the other. Specifically, this question asks whether, if an alternative forum has a stronger interest in the case than Michigan does, a Michigan court may dismiss the case on *forum non conveniens* grounds when the convenience factors are a wash, or only slightly, as opposed to "seriously," favor dismissal of the case.

A trial court should have discretion to dismiss a case in these circumstances. As noted above, "there is 'a local interest in having localized controversies decided at home.'" *Piper Aircraft,* 454 US at 260 (quoting *Gilbert,* 330 US at 509). Accordingly, when a controversy arises in another forum, that forum has an affirmative interest in deciding the case. Moreover, as this case illustrates, the burdens of adjudicating such cases will typically far outweigh Michigan's interest in the case. *See Piper Aircraft,* 454 US at 261. Thus, Michigan may have an affirmative interest in *not* deciding the case. The factors concerning the potential forums' respective interests in the case, therefore, can weigh heavily in favor of dismissal on *forum non conveniens* grounds.

In such circumstances, a trial court should not be required also to find that Michigan courts are a *seriously* inconvenient forum in order to dismiss the case on *forum non conveniens*

grounds. Instead, the analysis should be holistic, taking into account *all* of the relevant factors, rather than arbitrarily requiring a separate analysis of the convenience-related ones.

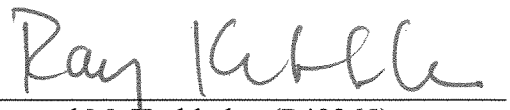
The *Roby* rule is especially inappropriate in cases brought by foreign plaintiffs based on incidents occurring on foreign soil. As noted above, a foreign plaintiff's choice of forum deserves less deference than does the choice of a U.S. citizen. *Piper Aircraft,* 454 US at 256. The showing of inconvenience necessary to overcome any deference to the plaintiff's choice of forum, therefore, is less demanding in cases brought by foreign plaintiffs. At a minimum, therefore, the *Roby* rule should be rejected in such cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

BUSH SEYFERTH KETHLEDGE & PAIGE PLLC

By: 

Raymond M. Kethledge (P49265)
3001 W. Big Beaver Road, Suite 600
Troy, MI 48084
(248) 822-7800

Attorneys for DaimlerChrysler Corporation

Dated: August 5, 2005